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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/692,857
Filing Date: October 27, 2003
Appellant(s): KROL, JAMES D.

Theodore Breiner
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 4/12/10 appealing from the Office action mailed 11/10/09.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 11-15 and 22-36 are pending and rejected in the application.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the

subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

RecipeUSA, Pizza-LowCarb, August 15, 2003.

The Google Disclosure Group, April 1/2003.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 11-15 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 11, the phrase " non-liquid ingredients" is indefinite because it is not known what would be considered as " non-liquid ingredients". It is not clear what is excluded or included from such phrase and the specification does not define what will constitute " non-liquid ingredients". The specification discloses the base layer comprises vegetables and fruits which are known to contain water; thus, it is not clear what is intended by " non-liquid food ingredients".

Claim 14 has the same problem as claim 11.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 11-15, 22-36 are rejected under 35 U.S.C. 103(a) as being unpatentable over the article of recipes for "Crustless Pizza" in view of the Google Group disclosure.

(It is noted that a typographical error was made in the rejection statement in the final rejection mailed on 11/10/09; claim 15 was not included in the rejection heading. This is clearly a typographical error because claim 15 was rejected in the office action mailed on 3/11/09. In the amendment filed 7/13/09, appellant cancelled claims 16-21 and added new claims 27-36; thus, the rejection heading was changed and in the process, claim 15 was omitted.

The recipe for Deep Dish Pizza teaches sprinkling shredded cheese over the bottom of dish, spreading on pizza sauce, sprinkling mozzarella, piling on topping and baked until bubble and brown. The pizza is allowed to stand for 10 minutes before cutting. The article also disclose crustless pizza made by forming a base layers of zucchini or spaghetti squash mixed with eggs and mozzarella cheese, spreading tomato

sauce on top of the base layer, adding additional topping layers and baking the pizza for 25 minutes.

The recipe does not teach forming a mixture of high gluten flour and baking powder, the baking temperature as claimed, freezing, thawing and reheating.

The disclosure on April 1, 2003 shows that it is known to make low carbohydrate crust using a little flour and some whey protein.

With regard to new claims 27-36, the language "consisting essentially of" does not define over the prior art. MPEP section 2111.03 states that "for the purposes of searching for and applying prior art under 102/103, absent a clear indication in the specification or claims of what the basic and novel characteristics actually are, "consisting essentially of" will be construed as equivalent to "comprising". For the Deep Dish Pizza, the base layer is formed by sprinkling cheese; in view of the Google disclosure, flour is added to the cheese which constitutes a base layer of cheese and flour. With regard to the Low Carb Pizza, the base layer is formed by mixing squash, eggs and cheese. There is not indication that the additional ingredient of egg and squash materially affects the claimed product as the specification discloses additional materials can be added to the base layer including moisture containing ingredients such as fruit, vegetable, fish etc.. As to the carbohydrate content, the pizza does not contain the traditional crust and the flour added is very little, it is expected the carbohydrate content is not as in traditional pizza and is in the range as claimed. It would have been obvious to one skilled in the art to vary the ingredients to adjust the carbohydrate content to the level desired. It is known in the art to make low carbohydrate pizza by

making low carbohydrate crust using little flour and whey protein. It would have been obvious to one skilled in the art to add flour and protein to the crust when making the Deep Dish Pizza to obtain different texture and flavor. The pizza is still low in carbohydrate because only little flour is used; the precise little amount of flour can vary depending on the taste, texture and amount of carbohydrate desired. As to the limitation of the base layer of non-liquid ingredients, it is unclear as explained in the 112 rejection what the limitation means. As far as the art rejection is concerned, the new limitation does not define over the prior art. The article teaches one recipe in which the cheese is sprinkle over the bottom of the dish; this is a base layer or the crust. If the little flour and protein is added, it would have been obvious to one skilled in the art to add it to the cheese because the discussion teaches to prepare a crust with the little flour and protein. The egg mixture is poured over the cheese; thus, it is an additional layer which is not excluded by the claim. Furthermore, even if the egg mixture is part of the cheese layer, the claims still do not define over the prior art. It is not clear what is excluded by the language " non-liquid ingredients". Egg is not water or milk so it can be considered as non-liquid ingredients. The specification and claim 14 recite the base layer comprises additional ingredients including vegetables and fruits; both fruits and vegetables contain water; thus, the base layer is interpreted to exclude pure liquid sources such as water. Also, the article teaches a recipe in which the base is made by mixing vegetable with cheese and egg. The moisture is squeezed out of the vegetable. Thus, the base is the same as claimed the claimed base layer does not exclude the egg component. It would have been obvious to use high gluten flour because such flour is

well known in the art and its use further reduces the carbohydrate content and is equivalent to the use of flour in combination with protein as taught in the prior art because high gluten flour has a higher protein content than regular flour. It would have been obvious to add baking powder to create bubbling appearance or to give little rising to make a firm structure. This is well known in the art as it is common to add baking powder to product containing flour. It would have been obvious to make up a batch of flour for use in multiple times; this would have been a matter of preference. It would have been obvious to select specific amount of flour depending on the carbohydrate content wanted. Since little flour is used, it is obvious the flour can be as little as 1 teaspoon; the amount used can vary depending on parameters such as carbohydrate content, taste, texture, flavor etc... It would have been obvious to use double acting baking powder when one wants a faster reaction. It would have been obvious to use higher temperature for shorter period of time. It would have been obvious to freeze the product for long term storage. When the product is frozen, it would have been obvious to thaw and reheat it to prepare the product for consumption. As to the language "consisting essentially of" in claim 16, the transitional language "consisting essentially of" is construed as equivalent to "comprising" absent a clear indication in the specification or claims of what the basic and novel characteristics actually are (see MPEP 2111.03). Furthermore, the prior art teaches essentially the same steps as claimed. When a little flour and protein is used in the base layer of the crustless pizza, it would have been obvious to one form the dry mixture of the flour. The recipe teaches to spread the cheese or the vegetable/cheese mixture onto a cooking pan. When the

flour is used, it would have been obvious to spread the flour onto the pan because the discussion teaches to use the flour in the crust. It would have been obvious to put the cheese first or flour first as an obvious matter of preference because both will be mixed together during baking to form a layer. The recipes teach to add additional layers and then baking for suitable time and temperature. Thus, the prior art teaches the steps of claims 16 and 22.

(10) Response to Argument

The 112 second paragraph rejection:

On page 10 of the appeal brief, appellant argues the claimed language of "a base layer of non-liquid ingredients" is definite because it is an ingredient which is not a liquid. This argument is not persuasive because the specification does not define "non-liquid ingredients" as appellant now asserts. It is true that flour is a non-liquid ingredient because it is a dry particulate ingredient; however, there are other ingredients such as vegetables, fruit included in the base layer that clearly contain water. For example, claim 14 recites non-liquid food product selected from "vegetables, fruits, fish etc."; it is not clear what is intended by this because vegetables, fruits contain liquid. On page 11 of the appeal brief, appellant argues vegetables and fruits are solids. While vegetables and fruits are solid, they contain water. The rejection does not question the definition of "liquid"; the rejection is based on the term "non-liquid ingredients". Appellant is not claiming the three states of matter. It is not clear what applicant intends by "non-liquid ingredients" and the specification does not give any insight into what non-liquid ingredients constitute. Clearly, many of the ingredients disclosed to be in the base

layers contains moisture. For example, vegetable, fruit, fish, contain moisture; thus, they cannot be considered as non-liquid ingredients. Thus, the claims are indefinite because it is not clear what is excluded or included in the ingredients to be considered non-liquid ingredients. Appellant points out that vegetables and fruits are not a liquid. The relevancy of this point to the issue in the rejection is not understood. The claims do not contain limitation of solid or liquid. Non-liquid ingredients are not the same as liquid. No one will argue that vegetables and fruits are liquid but they are considered as liquid-containing ingredient; thus, their inclusion in claims that exclude non-liquid ingredient makes the claims unclear and indefinite. On page 13 of the appeal brief, appellant comments the language "consisting essentially of" precludes any other ingredients which materially affect the basic and novel properties of the invention. Appellant states the addition of other ingredients which are not dry and which are liquid or contain liquid to the base layer would materially affect the base layer. This statement is a prior art issue. In any event, appellant's statements are contradictory because fruits and vegetables do contain liquid. Paragraph 00020 in the specification discloses vegetables such as tomato, onion, broccoli, mushroom can be added to the base layer. Tomato has a very high water content. While the water content can vary, the standard tomato contains about 93-95% water.

The 103 rejection

On page 15 of the appeal brief, appellant comments the examiner does not apply the references to each of the rejected claims and make conclusory statements. While making this statement, appellant does not specifically point to the claims where the

limitations are not addressed. The rejection explains clearly how the references are combined and the limitations in the claims are addressed.

On page 17 of the appeal brief, appellant argues the base layer of the deep dish pizza comprises Italian cheese and the liquid mixture of cream cheese, eggs, cream, parmesan and spices. The examiner respectfully disagrees with appellant. The recipe teaches to sprinkle the cheese over the bottom of the dish and pour the egg mixture over the cheese layer. Thus, the cheese layer is the base layer because it is at the bottom and the egg mixture is an additional layer on top of the cheese layer. On page 18 of the appeal brief, appellant states the pizza crust of the Low Carb Pizza contains either zucchini or spaghetti squash mixed with eggs and mozzarella. As stated in the rejection, the language "consisting essentially of" is interpreted to be the same as comprising in absence of showing how other materials material affect the basic and novel properties of the invention. Paragraph 00020 in the specification discloses vegetables such as tomato, onion, broccoli, mushroom can be added to the base layer. Vegetables contain water; for example, tomato has a very high water content. While the water content can vary, the standard tomato contains about 93-95% water. Thus, appellant has not demonstrated that the inclusion of egg in the Low Carb Pizza materially affects the claimed product. In any event, the Recipe USA also teaches crust made of cheese as shown in the "Deep Dish Pizza".

With respect to the Google group disclosure, appellant argues the reference teaches a conventional pizza crust that uses among other things a little flour and some whey protein. The examiner respectfully disagrees. The Google disclosure does not

disclose a conventional pizza crust that uses little flour and whey protein in addition to other things. The reference discloses "there are recipes for low carb crust that use a little flour and some whey protein". This is not a disclosure of conventional pizza crust. A 103 rejection must take into consideration the level of skill of one in the art. If the recipe is for low carb pizza crust, it would have been readily apparent to one skilled in the art to use very little flour because flour is the main source of carbohydrate in pizza crust. This is particularly obvious in combination with the teaching of using cheese or cheese, vegetable and egg for the crust. The flour is used for a little texture; it is not used to form the crust as in conventional pizza crust.

On pages 18-19, appellant sets forth the recipes and shows that the little flour and some whey protein is mixed together with the cream cheese, egg, cream, parmesan and spices. On page 20, appellant states that the Deep Dish Pizza when combined with the Google Groups disclosure provides for a liquid mixture including cream and beaten eggs poured over the cheeses. Appellant's statement that the little flour and protein are mixed with the cream cheese, egg and cream is reached by appellant's own conclusion. The Deep Dish pizza teaches to form a base by sprinkling cheese onto the baking pan. The Google disclosure teaches to form a crust using little flour and whey protein. Thus, when flour is added to the crust of the Deep Dish pizza, it would have been obvious to add it to the base layer of cheese because that is the crust of the pizza because it is the bottom layer. In a dough-base pizza, the crust is the bottom layer on which all other layers such as pizza sauce, cheese, meat topping, other toppings etc are piled on. Thus, the teaching of using little flour and protein to form the

crust in combination with the teaching of spreading 2 cup of shredded Italian cheese on a baking dish in which additional layers are piled on will lead one skilled in the art to add the flour and protein to the cheese layer because the cheese layer is the bottom layer which is the crust. With regard to the Low Carb Pizza, the claims do not exclude the egg and the squash and the specification has not shown that these components materially affect the claimed product as appellant claims and discloses additional components including fish, fruit, vegetables, meat etc... are added to the base layer mixture. Fruits, vegetables contains water; thus, there is no evidence to show that ingredients containing water materially affect the claimed product. On pages 20-22, appellant makes the same argument as above that the combination of references does not teach the limitations of claim 11. The argument is not persuasive as set forth. Appellant repeatedly argues that the addition of liquids used in the Deep Dish Pizza and Low Carb Pizza recipe would clearly materially change the characteristics of the claimed invention. As set forth above, the base layer of the Deep Dish Pizza is the Italian cheese layer. By liquids, appellant apparently refers to the cream and egg; however, this mixture of cream and egg is poured over the cheese layer. Thus, it is an additional layer on top of the cheese layer. The claims do not exclude additional layers. The pizza claimed includes additional layer including tomato sauce which is a liquid. Thus, appellant has not established that the additional layer would clearly materially change the claimed invention. The issue with the Low Carb Pizza is already addressed.

On pages 24-26, appellant argues the features recited in dependent claims 12,13 and 35. The limitations in these claims are addressed in the rejection and appellant

does not argue the obviousness position taken. For instance, with regard to the use of high gluten flour and double acting baking powder, it is stated in the rejection that " it would have been obvious to use high gluten flour because such flour is well known in the art and its use further reduces the carbohydrate content and is equivalent to the use of flour in combination with protein as taught in the prior art because high gluten flour has a higher protein content than regular flour. It would have been obvious to add baking powder to create bubbling appearance or to give little rising to make a firm structure. This is well known in the art as it is common to add baking powder to product containing flour. With respect to claim 13, it is stated in the rejection "it would have been obvious to make up a batch of flour for use in multiple times; this would have been a matter of preference. It would have been obvious to select specific amount of flour depending on the carbohydrate content wanted. Since little flour is used, it is obvious the flour can be as little as 1 teaspoon; the amount used can vary depending on parameters such as carbohydrate content, taste, texture, flavor etc... It would have been obvious to use double acting baking powder when one wants a faster reaction. The limitation of claim 35 is addressed in the rejection; appellant does not argue the position and simply points out the references do not teach the feature. It is already recognized the references do not disclose the feature.

On pages 26-33, appellant makes the same argument for claims 27,28, 30,31,32,34 as for claims 11,12,13,35 above. The argument is not persuasive for the same reason set forth above.

On page 33 appellant argues the combination of reference does not teach the sequence steps of claim 22. This argument is not persuasive. The Deep Dish pizza teaches to form a base by sprinkling 2 cups of Italian shredded cheese onto the baking pan. The Google disclosure teaches to form a crust using little flour and whey protein. Thus, when flour is added to the crust of the Deep Dish pizza, it would have been obvious to it to the base layer of cheese because that is the crust of the pizza because it is the bottom layer onto which additional layers are piled on. It would have been an obvious matter of preference to sprinkle the cheese first or the flour first. One would have been motivated to sprinkle the flour first because flour is a powdery substance that would coat the baking pan to prevent sticking. The egg mixture goes on top of the cheese layer; it is not part of the cheese layer as argued by appellant. The rejection sets forth the obviousness of using high gluten flour and a baking powder. High gluten flour is a flour having high protein content. It would have been obvious to use high gluten flour because such flour is well known in the art and its use further reduces the carbohydrate content and is equivalent to the use of flour in combination with protein as taught in the prior art because high gluten flour has a higher protein content than regular flour. It would have been obvious to add baking powder to create bubbling appearance or to give little rising to make a firm structure. This is well known in the art as it is common to add baking powder to product containing flour. Appellant does not argue why this modification would not have been obvious to one skilled in the art. Appellant makes the same argument for claim 36 as for claim 35 above. The Deep Dish Pizza and the Low Carb Pizza are not a dough based pizza. The ingredients such as cheese,

oregano, low carb pizza sauce are not high carbohydrate ingredients. The addition of the little flour and protein taught by the Google group adds very little carbohydrate. The pizza does not contain the traditional crust and the flour added is very little, it is expected the carbohydrate content is not as in traditional pizza and is in the range as claimed. Furthermore, since the objective is to make a low carbohydrate pizza, it would have been obvious to one skilled in the art to vary the ingredients to adjust the carbohydrate content to the level desired. For example, one can use tomato sauce with no sugar to further reduce the carbohydrate content.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Lien T Tran/

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